IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/**NO**
(3) REVISED **NO**

DATE:.....**23 November 2023**

SIGNATURE:.....

Case No. 41826/21

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	APPLICANT/PLAINTIFF
And	
BARNARD, CHRISTELLE	RESPONDENT/DEFENDANT

Coram: Millar J

Heard on: 20 November 2023

Delivered: 23 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on

23 November 2023.

JUDGMENT

MILLAR J

[1] This is an opposed application for summary judgment. The applicant (Standard Bank) sued the respondent (Ms. Barnard) on a deed of suretyship signed by her in its favour for the indebtedness of Multilayer Trading CC (Multilayer).

[2] During 2005, 2006 and 2007, Multilayer obtained various loans from Standard Bank which, besides the suretyship signed in its favour, were also secured by the registration of mortgage bonds over immovable property. The total amount of the loans was R 3,75 million.

[3] Multilayer was subsequently liquidated, and the immovable property sold on 8 March 2013 for R2 million. There was self-evidently a substantial shortfall and by 30 March 2021, this together with interest was R4 026 570.56. In August 2021 Standard Bank issued summons against Ms. Barnard, 8 years later. The action was defended and after the filing of a plea, the present application was brought on 24 March 2023.

[4] Ms. Barnard, in her affidavit opposing the grant of summary judgment, raised two defences.[1] The first was a point *in limine* and the second a substantive defence. I intend to deal with each of these in turn.

[5] The point *in limine* was that in respect of the applicant's affidavit seeking judgment, there was no compliance with the Justices of the Peace and Commissioner of Oaths Act (the JPC Act)[2] The non-compliance was said to be

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[1] The respondent had also brought a counterclaim, but this was abandoned in the affidavit opposing the grant of summary judgment.

[2] 16 of 1963 read together with the Regulations promulgated in terms of section 10 relating to the Administration of Oaths published in GN R1258 in *GG* 3619 of 21 July 1972.

in respect of the commissioning of the affidavit. The affidavit reflects that the oath was taken, and the affidavit deposed to in Johannesburg but that the address of the commissioner is reflected as being in Menlo Park Pretoria.

[6] In consequence of this, Ms. Barnard then asserted that:

> *"7.4. Further to the above and in terms of Regulation 4(1) the Commissioner of Oath shall certify that the deponent has acknowledged that he/she knows and understands the contents of the declaration and that he/she shall state the manner, place, and date of taking the declaration.*
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> *7.5. On what appears on the purported affidavit in support of the application for summary judgment, there is no indication of compliance with the provisions with specific reference to the addresses of where the deponent and the Commissioner of Oaths found themselves respectively at the time when the purported oath was administered to the deponent.*
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> *7.6. Ex facie the purported affidavit, it appears that the affidavit was pre-prepared for the deponent to sign such in the absence of a Commissioner of Oaths and that the Commissioner of Oaths identified on the document was requested to attest the affidavit in the absence of the deponent and, hence, not complying with the Regulations referred to supra."*

[7] The certificate at the end of the affidavit clearly states that both the deponent to the affidavit and the commissioner of oaths were present in Johannesburg when the oath was taken. There is no requirement that the affidavit reflect the specific address where the oath was taken.

[8] The regulations prescribe only that *"[t]he deponent shall sign the declaration in the presence of the commissioner of oaths"*[3] *and that "Below the deponents signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration."* [4] Furthermore, *"The commissioner of oaths shall (a) sign the declaration and print his full name and business address below his signature; and (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."* [5]

[9] The Commissioner has recorded that she holds office as a practicing attorney. She is as such a commissioner of oaths appointed *ex officio* for the whole of the Republic[6] and thus irrespective of where her office is located, she is entitled to administer the oath anywhere in the Republic subject of course to the deposition of the oath in her presence and compliance with the Regulations.

[10] The assertion by Ms. Barnard was incorrect and there was certainly no basis upon which to impugn the conduct of the commissioner of oaths. The affidavit complies with the JPC Act and accordingly the point *in limine* is without merit.[7]

[11] Turning now to the substantive defence. It was argued that the debt due to Standard Bank had become prescribed. This was the only defence proffered. It was argued for Ms. Barnard that once the property had been sold, Standard Bank in respect of the excess which was due but had not been recovered, was, now that the security was no longer held, in the same position as an unsecured creditor.

[12] The argument then proceeded on the basis that in respect of the excess, now that it was no longer secured, it was subject to the 3-year prescriptive period

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3 Regulation 3(1).

4 Regulation 4(1).

5 Regulation 4(2)(a)-(b).

6 GN 903 of 1998 in *GG* 19033 of 10 July 1998.

7 Coincidentally the affidavit of Ms. Barnard was commissioned under similar circumstances where the place of commissioning differs from the business address of the Commissioner.

laid down in section 11(d) of The Prescription Act.[8] The 30-year period argued by Standard Bank as provided for in section 11(a)(i) was simply not applicable as there was no longer any mortgage bond securing the debt. The debt had become prescribed and was unenforceable from March 2016 on the basis of this argument.

[13] In *Botha v Standard Bank*[9], a judgment of the Supreme Court of Appeal and which is on all fours with the present matter it was held in regard to prescription and a claim brought against a surety that:

> *"[23] Similarly, in South Africa, under the Prescription Act, different prescription periods are statutorily specified on the basis of the type of debt. This is also how the commencement and duration of prescription periods was treated in Oliff, under the provision applicable there. For present purposes it is apparent that the manner in which the UK courts have treated claims brought under a mortgage bond is consistent with the approach in Oliff. Prescription periods applicable to debts secured by mortgage bonds in both jurisdictions run from the date the right of action accrues and the debt is due. Once fixed, the period is immutable and unaffected by the subsequent cancellation of the bond. Put differently, in the United Kingdom it is the classification of the cause of action, and in South Africa the classification of the debt, which conclusively determines the period of prescription, not the fate of the security."*

and

> *"[28] So, the obiter dictum in Investec, underpinned by academic authority, that, once the security ceases to exist, the debt is no longer secured, is with respect not an accurate exposition of the law and is against the tenor of authority. <u>The true position is that it is only when the right of action accrues, and the debt is due that the prescription period is</u>*

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8 68 of 1969.

9 2019 (6) SA 388 (SCA).

> *determined. And once determined, the period is fixed and immutable it is not alterable retroactively through the subsequent cancellation of the bond. Investec is therefore only authority for the proposition that where the security is cancelled before the debt becomes due, and prescription has not yet begun to run against it, the debt is not a mortgage debt contemplated by s 11(a)(i) of the Act. This is consistent with Oliff."* (my underlining)

[14] There is accordingly no sustainable basis in law for the argument that the prescriptive period changed upon cancellation of the mortgage bond and accordingly when the summons was served the debt had not become prescribed and unenforceable.

[15] Ms. Barnard raised only one defence and for the reasons set out above it is, as a matter of law, unsustainable. For this reason, I am satisfied that Standard Bank is entitled to judgment.[10]

[16] In the circumstances Ms. Barnard is ordered to pay to Standard Bank:

[16.1] The sum of R4 026 570.56.

[16.2] Interest on the amount of R4 026 570.56 at the rate of 8% per annum from 30 March 2021 to date of payment, both dates inclusive; and

[16.3] Costs of suit on the scale as between attorney and own client which costs are to include the costs reserved on 16 August 2023.

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A MILLAR

JUDGE OF THE HIGH COURT

[10] *Skead v Swanepoel* 1949 (4) 763 (T) at 767.

HEARD ON:	20 NOVEMBER 2023
JUDGMENT DELIVERED ON:	23 NOVEMBER 2023
COUNSEL FOR THE APPLICANT/PLAINTIFF:	ADV. M RAKGOALE
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